

ORIGINAL



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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

DOUG LITTLE, Chairman
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ROBERT BURNS
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ANDY TOBIN

Arizona Corporation Commission

DOCKETED

MAR 21 2016

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2016 MAR 21 P 4: 38

AZ CORP COMMISSION
DOCKET CONTROL

IN THE MATTER OF THE FORMAL
COMPLAINT OF SWING FIRST GOLF LLC
AGAINST JOHNSON UTILITIES LLC

DOCKET NO. WS-02987A-16-0017

**SWING FIRST RESPONSE TO
MOTION TO DISMISS**

Swing First Golf, LLC ("Swing First") hereby responds to the Motion to Dismiss filed by Johnson Utilities, LLC ("Utility"). Utility's motion is baseless because:

1. The doctrine of *res judicata* does not apply to subsequent disputes between two parties based on new facts and circumstances.
2. The Commission clearly has jurisdiction to determine whether Utility can discontinue providing a tariffed service, including the Constitution and laws prohibiting illegal discrimination.

For these reasons, as more fully set forth below, Utility's motion should be denied.

I The Doctrine of Res Judicata Does Not Apply

Res judicata is more modernly known as "claim preclusion." *In re General Adjudication of All Rights to Use Water In Gila River System and Source*, 212 Ariz. 64, 69; 127 P.3d 882, 887 (Ariz. 2006) ("*Gila River*"). For claim preclusion to apply, the claims must be "related in time, space, origin, or motivation" *Id.* 212 Ariz. at 71; 127 P.3d at 889 (quoting Restatement of Torts (2d) § 24(2), cmt. B), (emphasis added). The claims must be based on a "common nucleus of operative facts." *Id.*

A subsequent Arizona case confirmed that res judicata only bars "subsequent claims [that] arise out of the same nucleus of facts." *Howell v. Hodap*, 221 Ariz. 543, 547; 212 P.3d

1 881, 885 (Ariz.App. Div. 1, 2009). Put another way, “the relevant inquiry is whether [the new
2 claim] could have been brought” in the prior action. *Id.*, quoting *United States ex rel. Barajas v.*
3 *Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998). “The determinative test asks whether the
4 claims in each case depend upon the same essential facts for their proof.” *Bill By and Through*
5 *Bill v. Gossett*, 132 Ariz. 518, 647 P.2d 649 (Ariz.App., 1982)

6 The current Complaint is based on an entirely new nucleus of facts and theories. Utility
7 notified Swing First that it is permanently discontinuing all Effluent deliveries, a Commission-
8 tariffed service. Utility instead intends to provide groundwater to Swing First, for which the
9 tariff rate is five times the Effluent rate. In its Complaint, Swing First has asked the Commission
10 to determine whether Utility can discontinue a tariffed service without authorization.

11 Applying the test from *Howell v. Hodap*, the current Complaint could not have been
12 brought as part of the previous complaints. Utility never stated that it would discontinue a
13 tariffed service. Swing First never asked that the Commission determine whether Utility could
14 discontinue the tariffed service without authorization. This is a new dispute that requests entirely
15 different relief. It could not have been brought previously.

16 Applying the test from *Bill By and Through Bill v. Gossett*, the current claim does not
17 depend on the same essential facts for their proof. The facts in the first Complaint concerned
18 Utility’s partial withholding of Effluent in 2007 and its overpricing for Effluent, CAP Water, and
19 other tariffed services. The facts in 2013 concerned Utility’s minimum bill charges, effluent
20 withholding, and Effluent quality. None of these facts are relevant in any way to the current
21 Complaint which stands on its own discreet, recent set of facts:

- 22 1. Utility informed Swing First and other parties that it intends to discontinue providing
23 tariffed Effluent service.
- 24 2. Utility did not apply to the Commission for authorization to discontinue tariffed
25 Effluent service.
- 26 3. Utility intends to instead provide groundwater to Swing First, which costs over five
27 times the Effluent rate.

4. Swing First will be forced out of business if Utility discontinues Effluent service.
5. As confirmed by public comments in this docket, closing the golf course would have catastrophic effects on the surrounding Johnson Ranch community.
6. Utility's discontinuation of Effluent Service is contrary to Commission policy, which requires the use of effluent for golf course irrigation if available.

Res judicata does not even remotely apply.

II Collateral Estoppel Also Does Not Apply

Collateral estoppel also does not apply. Collateral estoppel only concerns legal issues that were actually resolved by the tribunal. "[T]he judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit." *Nelson v. QHG of South Carolina Inc.*, 354 S.C. 290, 305; 580 S.E.2d 171 (S.C. App., 2003), quoting *Beall v. Doe*, 281 S.C. 363, 369 n. 1; 315 S.E.2d 186, 190, n. 1 (S.C. App., 1984). The Commission has never considered the facts alleged in the current Complaint, nor considered the raised issues, let alone issued any binding opinions concerning them. Further, concerning the previous complaints, no legal issues were actually litigated and the Commission made no determinations concerning any legal issues. Therefore, collateral estoppel also does not apply.

Finally, collateral estoppel does not apply to a judgment entered by consent, such as Swing First's voluntary dismissal.

[I]ssue preclusion (formerly referred to as collateral estoppel) "attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment. In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated."

Gila River, 212 Ariz. at 70; 127 P.3d at 888 (quoting *Arizona v. California*, 530 U.S. 392, 414, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000)). Concerning the prior complaints, no legal issues were actually litigated and the Commission made no determinations concerning any legal issues. Therefore, collateral estoppel also does not apply.

1 **III The Commission Certainly Has Jurisdiction concerning Discontinuance of a Tariffed**
2 **Service**

3 Arizona's Constitution provides the Commission full authority to oversee and regulate
4 Utility's provision of effluent for irrigation purposes: Article 14, Section 2, grants the
5 Commission jurisdiction:

6 All corporations other than municipal engaged ... in furnishing water for
7 irrigation ... or engaged in collecting, transporting, treating, purifying and
8 disposing of sewage through a system, for profit; shall be deemed public service
9 corporations.

10 Section 3 goes on to grant the Commission full jurisdiction to regulate public service
11 corporations such as Utility:

12 The corporation commission shall have full power to, and shall, prescribe just and
13 reasonable classifications to be used and just and reasonable rates and charges to
14 be made and collected, by public service corporations within the state for service
15 rendered therein, and make reasonable rules, regulations, and orders, by which
16 such corporations shall be governed in the transaction of business within the state,
17 and may prescribe the forms of contracts and the systems of keeping accounts to
18 be used by such corporations in transacting such business, and make and enforce
19 reasonable rules, regulations, and orders for the convenience, comfort, and safety,
20 and the preservation of the health, of the employees and patrons of such
21 corporations

22 Pursuant to its Constitutional authority, the Commission authorized Utility to provide
23 Effluent service. In Opinion and Order No. 60223, dated May 27, 1997, the Commission
24 authorized Utility to deliver and sell Effluent at the rate of \$0.62 per thousand gallons (\$200 per
25 acre-foot). These rates were incorporated into Utility's approved wastewater tariff. In Opinion
26 and Order No. 72579, dated October 1, 2011, the Commission approved a slight rate increase for
27 Effluent sales to \$0.63 per thousand gallons (\$205.29 per acre-foot), which were again
28 incorporated into Utility's wastewater tariffs.

29 Utility notified Swing First that it has discontinued tariffed Effluent deliveries effective
30 as of February 24, 2016. Yet, Utility has not received Commission authorization to discontinue
31 the tariffed Effluent sales previously authorized by the Commission. The Commission
32 authorized these sales and rates after full due process, including notice, hearings, and due

1 consideration by the Commission. Consequently, full due process is also required to discontinue
2 the tariffed service. Yet, Utility has discontinued its tariffed Effluent sales without providing its
3 customers any due process at all. Utility's action is unlawful. It could not sell Effluent without
4 Commission authorization. It cannot vary the terms of its tariff without Commission
5 authorization. And, it certainly cannot stop selling Effluent altogether without Commission
6 authorization.

7 Utility seems to believe that its tariff allows it to sell Effluent "as available." There is
8 nothing in the tariff or the Commission's Orders that support that view. It is only Utility's
9 unilateral action to withhold Effluent and put it to a different use that have made it unavailable.
10 This is no more lawful than if Southwest Gas were to discontinue gas sales to (existing) customer
11 number one in favor of (new) customer number two and justify it because the gas was no longer
12 "available" to customer number one. In both cases, only the company's unilateral action would
13 make the commodity unavailable.

14 **IV Utility's Action Is Contrary to Sound Public Policy and Precedent**

15 Utility's notice states "Beginning on February 24, 2015, Johnson Utilities will begin
16 serving you non-potable water pursuant to the Johnson Utilities tariff." Utility's tariff authorizes
17 Utility to sell non-potable water at the rate of \$0.84 per thousand gallons plus the applicable
18 CAGR fee. In Decision No. 75462, dated February 16, 2016, the Commission set Utility's
19 2016 CAGR fee at \$2.52 per thousand gallons. The total non-potable water rate is now \$3.36
20 per thousand gallons, over five times the Effluent rate of \$0.63 per thousand gallons. If the
21 Commission allows Utility to unilaterally discontinue its tariffed Effluent sales, Swing First's
22 annual irrigation bill will soar from approximately \$100,000 per year to over \$500,000 per year!

23 The effect of Utility's unlawful action would be catastrophic. Swing First competes in
24 the very competitive market for golf customers and it would be impossible for it to increase
25 greens fees enough to recover quintupled water costs. Swing First would be forced out of
26 business. And the consequences of Utility's unlawful action would extend beyond Swing First.
27 Property values would plummet for the thousands of existing Johnson Ranch homeowners when

1 their beautiful golf course degenerated to weeds, snakes, and bare dirt. Public comments from
2 affected homeowners underscores how devastating Utility's actions would be.

3 Utility's discontinuation of Effluent sales is not only unlawful, but contrary to established
4 Commission policy. Utility intends to sell groundwater to Swing First for irrigation. Yet, the
5 Commission has routinely prohibited utilities from selling groundwater for golf course irrigation.

6 IT IS FURTHER ORDERED that in light of the on-going drought conditions in
7 Arizona and the need to conserve groundwater, Willow Springs Utilities is
8 prohibited from selling groundwater for the purpose of irrigating any golf course,
9 or any ornamental lakes or water features located in the common areas of the
10 development.

11 *Willow Springs Utilities, LLC*, Decision No. 68963, dated September 21, 2006, at 16:19-22.¹

12 The Commission's strong preference in favor of effluent irrigation for golf courses is
13 consistent with overall Arizona public policy. For example, the City of Scottsdale's municipal
14 utility currently supplies effluent for irrigating 23 golf courses, making it a global leader in the
15 use of recycled water. [http://www.scottsdaleaz.gov/news/scottsdale-water-recognized-as-](http://www.scottsdaleaz.gov/news/scottsdale-water-recognized-as-global-leader-in-recycled-water-use_s4_p21798)
16 [global-leader-in-recycled-water-use_s4_p21798](http://www.scottsdaleaz.gov/news/scottsdale-water-recognized-as-global-leader-in-recycled-water-use_s4_p21798). This is consistent with Arizona's vision:

17 Treating wastewater and using the resulting effluent to meet a range of beneficial
18 purposes is increasingly important, especially in water-scarce regions such as
19 the desert Southwest.

20 "Water Reuse in Central Arizona, a Technical Report by Decision Center for a Desert City" at
21 21.²

22 Again, in this Complaint, Swing First is not asking the Commission to determine whether
23 Utility should be allowed to stop selling Effluent for irrigation and instead pump and sell
24 groundwater. This is clearly a terrible idea, but if this is what Utility wants to do, it must
25 formally apply for authorization with the Commission so that the Commission can evaluate
26 Utility's proposal after a thorough evidentiary hearing. For now, as is more fully set forth in its

¹ Accord: *Chaparral City Water Company*, Decision No. 68176; *Arizona Water Company*, Decision No. 68919; *Pichaco Water Company*, Decision No. 69174; *Green Acres Water LLC*, Decision No. 69256; *Double Diamond Utilities LLC*, Decision No. 70352; *Perkins Mountain Utility Company*, Decision No. 70663; *Wickenburg Ranch Water LLC*, Decision No. 70741; and *ICR Water Users Association, Inc.*, Decision No. 70977.

² https://sustainability.asu.edu/docs/dcdc/website/documents/DCDC_WaterReuse_Final.pdf

1 Complaint, Swing First is only asking the Commission to order Utility to continue providing
2 Effluent to Swing First and other customers at its tariffed rate until such time, if ever, that it
3 receives authorization from the Commission.

4 **V Utility's Discrimination in Favor of an Affiliate Also Provides the Commission**
5 **Jurisdiction to Hear This Complaint**

6 According to the Commission's website, Utility is owned by the George H Johnson Rev.
7 Trust, Jana S Johnson, and George H Johnson. A nearby golf course, the Club at Oasis L.L.C.
8 ("Oasis"), is owned by George Johnson's son, Chris Johnson and another affiliate, Hunt
9 Management LLC. Utility, George Johnson, Chris Johnson, and Hunt Management LLC all
10 share offices at 5310 E Shea Blvd, Scottsdale, AZ 85254.

11 In its November 2015 newsletter to its customers (copy attached as Exhibit A), Utility
12 bragged that it was providing Effluent to the Oasis golf course.

13 With conservation in mind, the grass at the Oasis Golf Course is irrigated with
14 reclaimed water from the Johnson Utilities system. Instead of using our precious
15 groundwater, we put the reclaimed water to beneficial use. Eventually, that
16 reclaimed water reaches the aquifer and is recycled.

17 It is beyond ironic that for Swing First, Utility would ignore conservation, disregard the
18 preciousness of ground water, and not put its reclaimed water to beneficial use.

19 The newsletter further establishes that Utility effectively controls and operates the Oasis
20 golf course.

21 Recently, we built new water features on every fairway at the golf course. These
22 water features allow for efficient disposal and recycling of excess reclaimed
23 water. Feedback from golfers provide that these water features add to the beauty
24 of the course. It's a win-win situation for everyone. We get to recycle precious
25 water and the neighbors have a nice view of beautiful grass year round.

26 Yet, Utility intends to deny the neighbors around Swing First's golf course the ability to "have a
27 nice view of beautiful grass year round.

28 Utility's actions are a *prima facie* example of illegal discrimination. Utility clearly
29 intends to benefit Oasis, its commonly controlled affiliate, by destroying a competitor golf

1 course. This gives the Commission yet another basis for jurisdiction. A.R.S. 40-243 provides the
2 Commission full authority to deal with discriminatory rates or service:

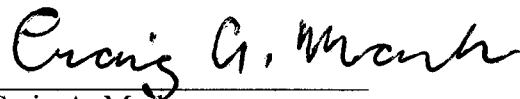
3 When the commission finds that the rates, fares, tolls, rentals, charges or
4 classifications, or any of them, demanded or collected by any public service
5 corporation for any service, product or commodity, or in connection therewith, or
6 that the rules, regulations, practices or contracts, are unjust, discriminatory or
7 preferential, illegal or insufficient, the commission shall determine and prescribe
8 them by order, as provided in this title.

9 **VI Conclusion**

10 The Commission has full (and likely exclusive) jurisdiction to deal with Utility's
11 unauthorized discontinuation of a tariffed service and its illegal discrimination in favor of its
12 affiliate. As this Complaint involves entirely new facts and issues, none of which have been
13 considered by the Commission, neither res judicata nor collateral estoppel bars this Complaint.
14 Further, this Complaint raised issues of great public importance, well beyond the impacts on
15 Swing First, that only the Commission can resolve.

16 Swing First asks the Commission to expeditiously proceed to consider the issue of
17 whether Utility can unilaterally discontinue a tariffed service and also whether Utility can
18 discriminate in favor of its commonly controlled affiliate.

19 RESPECTFULLY SUBMITTED on March 21, 2016.

20 
21

22 Craig A. Marks
23 Craig A. Marks, PLC
24 10645 N. Tatum Blvd., Ste. 200-676
25 Phoenix, Arizona 85028
26 (480) 367-1956 (Direct)
27 (480) 304-4821 (Fax)
28 Craig.Marks@azbar.org
29 Attorney for Swing First Golf LLC
30

31
32 Original and 13 copies **filed**
33 on March 21, 2016, with:

34
35 Docket Control
36 Arizona Corporation Commission
37 1200 West Washington
38 Phoenix, Arizona 85007

**NOVEMBER
2015**

**News That
Concerns Your
Water!!!**

The Johnson Utilities Newsletter

SAN TAN VALLEY VILLAGES

Last month we proposed an alternative to the expensive incorporation efforts taking place in the San Tan Valley. A model that has proved successful in communities throughout the U.S. is the creation of 'Villages'.

The Village concept is a way to provide San Tan Valley citizens, businesses, service providers and civic groups a unified voice in planning, promoting and improving the quality of life in San Tan Valley. The unification of neighborhoods into 'Villages' will provide a mechanism to effectively communicate with elected officials and allow citizens of the San Tan Valley to participate in the decision making process with Pinal County.

By creating this communication forum, we are able to be heard on a wide variety of concerns that affect our region. Some issues may pertain to the entire area, others just to a particular location.

We are suggesting 5 'Villages' of the San Tan Valley. Representatives are selected from each Village and serve as a member of their Village Committee. One person from each Village Committee will serve on a unified Village Council. Subcommittees in each Village Committee could also be formed with additional persons having expertise in a certain area of interest and as standing information resources.

Participation in the Villages is, of course, voluntary. These representatives will work closely with Pinal County in serving the needs of San Tan Valley. And with the largest voice in the county – over 100,000 residents, the County will certainly listen. It's also a great way to learn how our County government works and how you can effectively understand and participate with it.

These are the the proposed boundaries:



This is the first part in a series of articles describing what a 'Village' concept is and how it can work in the San Tan Valley.

The Village Concept is a great way to have open, representative, grassroots participation. Residents, business people, civic groups, Home Owners Associations and service providers are encouraged to become involved.

Bonanza Water Main Installations

Johnson Utilities has gone above and beyond in the Bonanza area with some assistance from the Johnson Foundation to assist residents in obtaining water service to their properties. In addition, this brings a 100 year assured water supply. Tell Johnson Utilities you want water service on your street by calling (480) 987-9870.

- San Tan Valley Safe Water
Advocates, LLC

DISCLAIMER: You have received this newsletter because you are a customer of Johnson Utilities, L.L.C. This newsletter is provided for informational purposes only. The information provided herein is provided "as is" and without warranties of any kind, express or implied. To the fullest extent permitted by applicable law, Johnson Utilities, L.L.C. disclaims all warranties, express or implied, including but not limited to, implied warranties of merchantability and fitness for a particular purpose. Johnson Utilities, L.L.C. does not warrant or make any representations regarding the use or the results of the use of the information in this newsletter in terms of its correctness, accuracy, time lines, reliability or otherwise. If any provision of this Disclaimer is found to be unlawful or unenforceable, then that provision shall be deemed severable from this Disclaimer and will not affect the validity or enforceability of any remaining provisions of this Disclaimer.

WHY WE OVERSEED THE GOLF COURSE AT OASIS IN THE WINTER

In our area of Arizona, bermuda grass goes dormant typically for 6-10 weeks from mid-December through February when the temperatures drop. So in order to keep the grass beautiful and green, it is a common practice for golf courses to overseed with ryegrass.

With conservation in mind, the grass at the Oasis Golf Course is irrigated with reclaimed water from the Johnson Utilities system. Instead of using our precious groundwater, we put the reclaimed water to beneficial use. Eventually, that reclaimed water reaches the aquifer and is recycled.

Recently, we built new water features on every fairway at the golf course. These water features allow for efficient disposal and recycling of excess reclaimed water. Feedback from golfers provide that these water features add to the beauty of the course. It's a win-win situation for everyone. We get to recycle precious water and the neighbors have a nice view of beautiful grass year round.

Quote from Karen Christian on The Florence Copper Facebook Page

"As a co-founder of San Tan Valley Safe Water Advocates, and having studied many water-related issues throughout our state over the past 3 years, I stand here today . . . in full support of the Florence Copper Project." - Karen Christian

Question?

How can someone who is the co-founder of the so-called San Tan Valley Safe Water Advocates state that she's in full support of the Copper Project in Florence which in our humble opinion would contaminate our groundwater. Is that not hypocritical that someone who is a so-called safe water advocate could be in favor of a mine that could potentially do this to our groundwater? (See photo below of the Animas River contamination from mine spill this year).

Karens EPA public hearing speech, go to:
https://www.youtube.com/watch?v=5go9x_AQn40&feature=youtu.be



Thoughts from our Customer about San Tan Valley Incorporation ...

*Editor of the Newsletter,
We have enough corruption in local, city, county
and federal governments and do not need to be
incorporated.
Our governments are being run by lobbyists, and
are not looking out for our citizens' best interests.
Lies & dishonesty are lost soon after the elections.
This community we live in, has been doing fine
without the help of politicians.
I think no, and vote no, to incorporation.*

*Respectfully yours,
Dana D. Dubrow*



Monday

Open Play

Tuesday

Open Play

Wednesday

Open Play

Thursday

**Open Play/
Skins
Game**

Friday

**Open Play/
Sundowners 9 holes
w/potluck after
game**

Saturday

**Open Play/
Men's / Women's
Leagues**

Sunday

**Open Play/
Kids 12 and under
play free w/paid adult**

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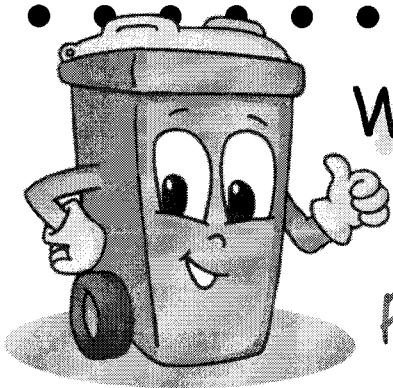
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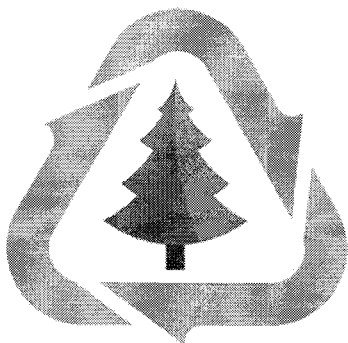


Words to Recycle By

With Central Arizona Solid Waste
www.centralazsolidwaste@gmail.com

FACTS:

**Every three months,
Americans throw
enough aluminum in
the landfills to build
our nation's entire
commercial air fleet.**



If your community or HOA does not recycle, ask "Why not?" Find out why not and ask how you can! Central Arizona Solid Waste partners to provide trash pickup and includes FREE curbside recycling to the HOA communities in San Tan Valley.

San Tan Valley Chamber of Commerce Corner



This is a new feature you will see in our newsletter about our local chamber. Two previous chambers merged together 2 years ago to form the now official San Tan Valley Chamber of Commerce (STV) and it has now grown to over 270 members.

Any business, organization or non-profit is welcome to join and the annual fee starts at \$75 depending on the type of membership.

There are two meetings held monthly:
Dinner and Business After Hours - The 2nd Thursday of the month at 6pm at Encantera.

Lunch and Learn - The 3rd Thursday of the month with a monthly guest speaker held at Noon at the Central AZ College San Tan Campus located on Bella Vista Rd

The next upcoming event sponsored by the STV Chamber is the Annual Holiday Parade, Saturday morning, December 5th on Johnson Ranch Blvd. They are looking for floats and participants.

Contact the Chamber for details:
480-788-7516, www.santanchamber.com.

Water Tip #180

www.wateruseitwisely.com

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**INSPECT YOUR LANDSCAPE IRRIGATION
SYSTEM REGULARLY FOR LEAKS OR
BROKEN SPRINKLER HEADS AND ADJUST
PRESSURES TO SPECIFICATION.**

